ANGEL CAKE HOUSE SDN BHD & ORS

v.

BANDARAYA DEVELOPMENT BHD

HIGH COURT MALAYA, KUALA LUMPUR
TEE AH SING J
[CIVIL SUIT NO: S9-22-299-89]
2 FEBRUARY 2001

CIVIL PROCEDURE: *Pleadings - Defence - Amendment of - Whether allowable under O. 20 r. 5(2) & (5) Rules of the High Court 1980 - Character of defence - Delay - Justice of case*

CIVIL PROCEDURE: *Amendment - Defence - Delay in applying for amendment - Whether amendment allowable under O. 20 r. 5 (2) & (5) Rules of the High Court 1980 - Character of defence - Delay - Justice of case*

The plaintiffs appealed to the judge in chambers under O. 56 r. 1 of the Rules of the High Court 1980 ('RHC') against the decision of the senior assistant registrar ('the SAR') in allowing the defendant's application to amend its statement of defence.

The main issue before the court was whether under O. 20 r. 5(2) and (5) of the RHC, the defendant in seeking to amend its statement of defence was able to satisfy two requirements: (i) that the facts of the case remain substantially the same without in effect turning the defence from one character to another inconsistant character; and (ii) that the justice of the case was with the defendant.

Held:

[1] The defendant might have been able to show that most of the facts in its proposed amendments would not change the character of the defence, but was unable to explain the long and inordinate delay of ten years for the application to amend the statement of defence. This showed a lack of *bona fide* on the part of the defendant and it was unable to satisfy the court that the justice of the case was with it.

[Plaintiffs appeal allowed.]

Case(s) referred to:
Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 ***(refd)***
"Benoi VI" Sindo Timber Enterprises (Pte) Ltd v. "Benoi VI" (Owners & Ors) [1980] 2 MLJ 265 ***(refd)***
Chin Kok Kwong Construction Sdn Bhd v. Sunrise Towers Sdn Bhd [1984] 2 CLJ 232 ***(refd)***
Hong Leong Finance Ltd v. Famco (S) Pte Ltd & Ors [1992] 2 SLR 1108 ***(refd)***
Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor [1988] 1 CLJ 632 ***(refd)***
Taisho Co Ltd Bhd v. Pan Global Equities Bhd & Anor [1999] 1 CLJ 703 ***(foll)***
The Hong Kong & Shanghai Banking Corporation v. Tang Hong [1959] 25 MLJ 51 ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 5(2), (5), O. 56 r. 1

Other source(s) referred to:
Malaysian High Court Practice 1998, pp 551-553

For the plaintiffs - B Muralidharan; M/s Lewis & Co
For the defendant - Yew Lee Ann; M/s Nadzarin, Sena & Lim

Reported by Raja Vishnu

JUDGMENT

Tee Ah Sing J:

This is an appeal by the plaintiffs to the judge in chambers (encl. 66) under O. 56 r. 1 of the Rules of the High Court 1980 ("the RHC") against the decision of the learned senior assistant registrar ("the SAR") given on 10 November 1999 in allowing the defendant's application (encl. 58) for leave to amend the statement of defence.

The application is supported by the affidavit of Low Kim Seng affirmed on 17 June 1999 (encl. 57).

An affidavit jawapan was affirmed by Robert Tan Tee Keng on 6 September 1999.

An affidavit jawapan was affirmed by Low Kim Seng on 4 October 1999.

The learned counsel for the plaintiffs submitted, *inter alia*, as follows:

a) Generally an application for amendment would be allowed if there is no injustice caused and the application made *bona fide* and the facts remain substantially the same.

Here there has been a delay of more than ten years which has not been explained. So there has been lack of *bona fide*.

b) The proposed amendments will alter the defence into one of inconsistent character. This will cause grave injustice to the plaintiffs which cannot be compensated by costs.

c) In support the following authorities were cited:

(a) *Malaysian High Court Practice 1998* pp. 551 to 553;

(b) *Taisho Co. Ltd. Bhd. v. Pan Global Equities Bhd. & Anor* [1999] 1 CLJ 703;

(c) *Hong Leong Finance Ltd. v. Famco (S) Pte Ltd. & Ors* [1992] 2 SLR 1108;

(d) *Ismail bin Ibrahim & Ors v. Sum Poh Development Sdn. Bhd & Anor* [1988] 1 CLJ 632;

(e) *The Hong Kong & Shanghai Banking Corporation v. Tang Hong* [1959] 25 MLJ 51.

The learned counsel for the defendants submitted, *inter alia*, as follows:

a) The cases cited by the plaintiffs show that the prejudice are very much confined to the facts in each of the cases cited. So it cannot be said that delay *perse* is the hall mark of a lack in *bona fide.*

b) The plaintiffs have not shown how the prejudice may come about. Examples of situations where the other party being prejudiced besides in the cases already cited by the plaintiffs is for example where the evidence required for the plaintiffs to prove their claim should the defence be amended has been destroyed in the intervening years or that they have substantially altered their position in reliance of the defence. This was the situation which arose in the case of *The "Benoi VI" Sindo Timber Enterprises (Pte) Ltd. v. "Benoi VI" (Owners & Ors)* [1980] 2 MLJ 265.

c) Delay itself cannot be a bar to allowing the defendants to amend. The basic principle governing the courts discretion in allowing a party to amend are stated in the cases of *Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn. Bhd. & Ors* [1983] 1 CLJ 191 and *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361.

d) The defendants application was made *bona fide* and it was not for a tactical manoeuvre.

e) The prejudice to the plaintiffs if any at all can be compensated by costs.

(f) The proposed amendments will not turn the defence from that of one character into another inconsistent character. The proposed amendments are in essence (i) to put the plaintiffs to strict proof of the alleged sale and purchase agreements (ii) to deny making representation to the plaintiffs bearing in mind that the plaintiffs have failed to particularise the alleged representations in their better and further particulars dated 5 June 1997. And the defendant cannot be said to admit to representations the particulars of which have been denied and (iii) to aver that the 3rd, 4th, 5th and 6th plaintiffs were unable to obtain financing.

Further in the case of *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361 the Court of Appeal held that even when the amendments give rise to new cause of action or defence it should be allowed subject to an award of costs. The case of *Chin Kok Kwong Construction Sdn. Bhd. v. Sunrise Towers Sdn. Bhd.* [1984] 2 CLJ 232 was also cited.

g) The defendants application was made before the trial of the matter.

h) Not to allow the amendments would be to work injustice on the defendants.

I shall now deal with the appeal before me.

The principles whether an application for amendment of pleading should be allowed or not are set out in *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.* [1983] 1 CLJ 191 where his Lordship Mohamed Azmi FJ (delivering the judgment of the Federal Court) at p. 192 said:

> Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleading. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine*) [1963] MLJ 248. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bone fide*: (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* p. 342). If the answers are in the affimative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even

if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

In *Taiso Co. Sdn. Bhd. v. Pan Global Equities Bhd. & Anor* [1999] 1 CLJ 703 His Lordship Haidar JCA (delivering the judgment of the Court of Appeal) said at pp. 710 to 711 as follows:

> GP Selvam JC, in *Multi-Pak Singapore Pte Ltd (In receivership) v. Intraco Ltd & Ors* [1992] 2 SLR 793, in considering the true construction of O. 20 r. 5(2) and (5) stated at p. 802, 'a plaintiff seeking an order under it must satisfy two requirements: (a) that the facts of the case remain the same or substantially the same; and (b) that the justice of the case is with him. If he fails in one, he fails altogether. As the power conferred on the court is discretionary, the court considering the application should adopt a broad common sense approach. The learned JC went on further to state at p. 803:
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> > Even if the plaintiffs had complied with the first requirement, they had not shown that it would be just to grant them the application. A party asking the court to exercise a discretionary power in his favour must place some material and advance some cogent reasons to impel the court to lean on his side: see *Ratnam v. Cumarasamy* [1965] 1 WLR 8.
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> The judgment of the learned JC was affirmed by the Court of Appeal (see *Multi-Pak Singapore Pte Ltd (In receivership) v. Intraco Ltd* [1993] 2 SLR 113).
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> The two requirements stated by the learned JC are similarly covered by our O. 20 r. 5(2) and (5). The learned CJ of Singapore in *Lim Yong Swan* on the other hand described the two requirements as conditions. It makes no difference as it is a matter of choice of words. We therefore could not possibly see anything wrong in the learned judge relying on the Singapore cases for guidance in the construction of our O. 20 r. 5(2) and (5).
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> In *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, the Federal Court went on further to state that three basic questions should be considered to determine whether injustice would or would not result in considering the application for amendments. One of the basic questions is whether the application was *bona fide*.
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> The learned judge intimated that the application was made after the appellant failed on appeal to this court to affirm the judgment entered by it initially. Further, he said that the appellant had knowledge of the 'acknowledgement' as late as April 1987, that is four years before the action was filed. Furthermore, the application was filed four years after the commencement of this action. We would add further that no reasons were

given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in *Multi-Pak Singapore Pte Ltd* and correctly followed by the learned judge, the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side. We would further add that the application borders on lack of *bona fides*, one of the basic questions set out in *Yamana Motor Co Ltd.*

The learned judge was of the view that condition (2) had not been satisfied by the appellant, that is it would be just to grant leave to amend.

We were of the opinion that the learned judge had correctly considered the two requirements or conditions envisaged under O. 20 r. 5(2) and (5) of the RHC. In the circumstances, he had exercised his discretion judicially. As the appellant failed in one, it failed altogether. There were no good grounds for us to interfere.

So under our O. 20 r. 5(2) and (5) of the RHC the defendants in seeking an order under it must satisfy two requirements: (1) that the facts of the case remain the same or substantially the same; and (2) that the justice of the case is with the defendants. (see *Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703).

I shall deal with the first requirement, that is that the facts of the case remain the same or substantially the same.

In the original statement of defence the defendants had earlier admitted that various sale and purchase agreements in writing ("the said agreements") were concluded between them and the plaintiffs and that pursuant to the said agreements the plaintiffs paid a sum amounting to 10% of the purchase price ("the deposits"). In paras 1 and 2 of the proposed amended statement of defence the defendants now deny the existence of the said agreements and that the deposits were paid. Further under para. 5 of the proposed amended statement of defence the defendants admit that there were various sale and purchase agreements entered into between the plaintiffs and the defendants. The proposed amendments woud not turn the suit into another suit of inconsistent character. The facts of the case for the plaintiffs remain the same that is they have to prove that the said agreements were executed between the plaintiffs and the defendants. The plaintiffs have to prove that they paid the deposits to the defendants. So I would allow the proposed amendments.

I am of the view that the amendments in para. 3 of the proposed amended statement of defence remain substantially the same, that is, the defendants admit that they did issue brochures and by the amendments they specify that the brochures were in respect of a project known as Tivoli Villas and they deny the rest of para. 4 of the statement of claim. So I would allow these amendments.

The amendments in para. 4 of the proposed amended statement of defence remains substantially the same, that is, the defendants deny making any representations to the plaintiffs. This is consistent with para. 2 of the original statement of defence. So I would allow these amendments.

In para. 4 of the original statement of defence it is pleaded in the alternative that the statements made in para. 6 is unfounded. However in para. 5 of the proposed amended statement of defence the alternative plea is that the statement made in para. 6 of the statement of claim were concocted by the plaintiffs for the purpose of enabling the plaintiffs to rescind their agreements. I am of the view that the amendments would not turn the suit into another inconsistent character. So I would allow the amendments.

The original para. 5 of the statement of defence has been deleted and by para. 6 of the proposed amended statement of defence the defendants admit that certain inquires were made by the plaintiffs, but the rest of para. 7 of the statement of claim is denied. I am of the view that the amendments would not turn the suit into another inconsistent character. I would allow the amendments.

Paragraphs 7 and 8 of the proposed amended statement of defence are substantially the same as pleaded in para. 6 of the original statement of defence which has been deleted under the proposed amended statement of defence. I would allow the amendments.

Paragraph 9 of the proposed amended statement of defence does not change the character of the suit. I would allow the amendments.

Paragraph 10 of the proposed amended statement of defence does not change the character of the defence but remain substantially the same. In para. 8 of the original statement of defence the defendants deny making any misrepresentation. In the proposed amendments the defendants deny making representations in respect of the sale and purchase agreements referred to in the statement of claim but admitted that the defendants made oral representations for the project known as Tivoli Villas. In the proposed amendments there is added an averment that the plaintiffs have failed to particularise the misrepresentation and by whom if any it was made. This will not change the character of the suit as it is for the plaintiffs to prove that misrepresentations were made and by whom on behalf of the defendants. The proposed amendments are amendments to clarify the issues in disputes. I would allow the amendments.

Paragraph 11 of the proposed amended statement of defence is substantially the same as pleaded in para. 9 of the original statement of defence in that they now deny para. 10 of the statement of claim. I would allow the said amendments.

Paragraph 12 of the proposed amended statement of defence aver *inter alia* that "the defendants will at the trial of this matter prove that the 3rd, 4th, 5th and 6th plaintiffs were unable to obtain financing to their properties and/or as a result of the down turn in the property market were unable to comply with the terms of the sale and purchase agreement entered into with the defendants and therefore defaulted in making the 2nd progress payment as demanded under the said sale and purchase agreements".

It is plain that the proposed amendments in para. 12 would introduce a new defence in that it could not be said that it had arisen out of the same facts or substantially the same facts as a defence in respect of which defence has already been pleaded.

I agree with the contention of the learned counsel for the plaintiffs that the proposed amendments seeks to convert the defence into an inconsistent defence of a different character. This will prejudice the plaintiffs. As such I disallow the proposed amendments in para. 12.

Paragraph 13 of the proposed amended statement of defence is only a minor amendment by the inclusion of the word "paras 11". I would allow the said amendments.

I shall next deal with the second requirement, that the justice of the case is with the defendants.

A brief chronology of events is set out below:

(a) The writ of summons was filed on 11 April 1989

(b) The statement of defence was filed on 4 May 1989

(c) The case was set down for trial in February 1990

(d) On 12 May 1993 the defendants filed an application for further and better particulars of the statement of claim.

But the application for leave to amend the statement of defence was only filed on 21 Jun 1999. Thus there has been a delay of ten years in applying for the amendments.

According to the affidavit of Low Kim Seng affirmed on 17 June 1999 (encl. 57) the defendants had on 24 March 1999 appointed their new solicitors, that is Tetuan Nadzarin, Sena & Lim to take over the conduct of the case. It was also averred that the defendants were advised by their new solicitors that it was necessary that the statement of defence be amended as the statement of defence was not complete and did not state the facts of the case fully.

I find that the aforesaid reasons are not good reasons to explain for the long delay. I find that no explanation were given as to why the defendants has not come sooner to seek leave for the proposed amendments. Further the defendants knew the facts all along. The delay has not been accounted for by affidavit evidence.

This there are no sufficient material and cogent reasons before the court for the court to exercise its discretion in favour of the defendants, that is, it would be just to grant leave to amend.

Further I find that the long and inordinate delay of ten years in making the application to amend shows the lack of *bona fide* of the defendants.

As the defendants have failed to satisfy the court that the justice of the case is with them the application of the defendants to amend the statement of defence should have been dismissed by the learned SAR for in the case of *Taisho Co. Sdn. Bhd. v. Pan Global Equities Bhd. & Anor* [1999] 1 CLJ 703 His Lordship Haidar JCA at p. 711 said:

> The learned judge was of the view that condition (2) had not been satisfied by the appellant, that is it would be just to grant leave to amend.
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> We were of the opinion that the learned judge had correctly considered the two requirements or conditions envisaged under O. 20 r. 5(2) and (5) of the RHC. In the circumstances, he had exercised his discretion judicially. As the appellant failed in one, it failed altogether.

As such I allow the appeal by the plaintiffs against the decision of the learned SAR and set aside the said decision. The costs of this appeal shall be paid by the defendants to the plaintiffs to be taxed unless agreed.